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No. 09-1353

In the Supreme Court of the United States

IRON THUNDERHORSE,

Petitioner,

v.

BILL PIERCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

The Acting Solicitor General agrees with petitioner that the court of appeals' judgment in this case is incorrect. U.S. Br. 18-20. He also agrees that the errors in reasoning that produced it are sufficiently clear and consequential to warrant summary reversal. *Id.* at 20. The Acting Solicitor General suggests, however, that the errors that produced the Fifth Circuit's fundamentally flawed judgment are case-specific enough to warrant denial of plenary review. *Id.* at 20-21. This appears to be only the third time in more than 50 years that the Office of the Solicitor General has made such a recommendation in response to a certiorari-stage order seeking the views of the United States.[1] In both of the prior cases, this Court granted plenary review and ultimately reversed the lower court's judgment. See *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993); *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197 (1988).

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[1] We obtained these figures from a database containing information about 787 responses filed to certiorari-stage invitations between 1957 and through October Term 2008. See John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 Geo. Wash. L. Rev. 518, 526 (2010) (reporting information from the database). We also consulted the Solicitor General's website, which contains all invitation briefs filed during October Terms 2009 and 2010. We found no cases other than those described above in which the Solicitor General suggested a summary reversal, or, in the alternative, denial of certiorari. We also found eleven cases since 1957 in which the Solicitor General recommended some combination of denial of certiorari or vacatur of the decision below.

The Court should do the same here. The conflict among the circuits is real and not going away. The decision below, while unpublished, simply repeats errors of published decisions, and it is not an outlier within the Fifth Circuit. Finally, the legal standard governing the "least restrictive means" requirement under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, is in grave need of clarification.

A. The Conflict Is Real

The Acting Solicitor General argues that there is no real conflict among the courts of appeals because they "are in agreement about how to apply RLUIPA's 'least restrictive means' standard." U.S. Br. 8. That is incorrect.

The main evidence of agreement offered by the Acting Solicitor General consists of a series of brief quotations that contain generic admonitions against "blindly accept[ing]" explanations offered by prison officials. U.S. Br. 10-11 (citation omitted). Agreement at that boilerplate level of generality, however, is hardly proof that no conflict exists. Instead, the relevant question is whether courts are applying different legal standards and reaching inconsistent results with respect to materially similar claims. The answer is yes.

The Fifth and Ninth Circuits have both acknowledged that their published decisions are in conflict with one another. In this case, the Fifth Circuit concluded that it was bound by its own

previous decisions in *Diaz* v. *Collins*, 114 F.3d 69 (1997), and *Longoria* v. *Dretke*, 507 F.3d 898 (2007), and it expressly refused to follow the Ninth Circuit's decision in *Warsoldier* v. *Woodford*, 418 F.3d 989 (2005). See Pet. App. 8a-10a & n.3. The Fifth Circuit's description of this conflict could not be clearer:

> The Ninth Circuit [in *Warsoldier*] found that the restriction [on hair length] was not the least restrictive means to maintain prison security, in part, because the prisons run by the federal government, Oregon, Colorado, and Nevada all permit long hair or provide religious exemptions to their hair length restrictions. * * *. This Court, however, is bound by *Diaz* and *Longoria*.

Id. at 10a n.3 (citation omitted). For its part, the Ninth Circuit recognized in *Warsoldier* that its analysis of these issues conflicted with the Fifth Circuit's analysis in *Diaz*:

> In * * * *Diaz v. Collins*, the Fifth Circuit upheld a prison grooming policy requiring that male inmates maintain short hair without discussing whether any other less restrictive means that could accomplish the same compelling interest were offered by the inmate or rejected by the prison. * * * But, under RLUIPA, [the state prison system] is *required* to demonstrate not only that that its policy serves a compelling interest, but also that it has employed the least restrictive means to achieve that compelling interest.

418 F.3d at 997 (citation omitted).

These differences in approach have produced different results. In *Warsoldier*, the Ninth Circuit granted relief to the inmate plaintiff, relying heavily on the fact "that other prison systems, including the Federal Bureau of prisons, do not have such hair length policies or, if they do, provide religious exemptions." 418 F.3d at 999. In another case, the Eleventh Circuit reversed a grant of summary judgment against a Native American inmate who was challenging a prison's total ban on long hair because "the evidentiary record relating to hair-length claims is over ten years old and * * *, in the intervening time, prison staffing and administration, prison safety and security, and the prison population of Alabama have changed." *Lathan* v. *Thompson*, 251 Fed. Appx. 665, 667 (11th Cir. 2007) (per curiam).

In *Longoria*, in contrast, the Fifth Circuit denied relief without inquiring about practices at other prisons, see 507 F.3d at 904, and, in this case, the Fifth Circuit viewed *Longoria* as rendering irrelevant petitioner's evidence that "other prison systems, including the Federal Bureau of Prisons, permit long hair," Pet. App. 10a n.3. In another case, the Sixth Circuit reversed a district court's carefully reasoned conclusion that prison officials had failed to demonstrate that a blanket rule against long hair was the least restrictive means of achieving adequate security, notwithstanding the lack of any evidence that previously recognized exceptions had resulted in security incidents. See *Hoevenaar* v. *Lazaroff*, 422

F.3d 366, 369-371 (2005), cert. denied, 549 U.S. 875 (2006).

The government suggests that these concededly "different results" can be explained away by the fact that different prisons and prison systems "hold different types of inmate populations and are subject to different types and degrees of logistical constraints." U.S. Br. 18. That is incorrect. In *Hoevenaar*, for example, the district court order overturned by the Sixth Circuit had been expressly limited to inmates with a "low security risk" and had called for a "case-by-case" assessment of whether an inmate should be permitted to grow a particular type of long hair. 422 F.3d at 369. And in *Fegans* v. *Norris*, 537 F.3d 897 (2008), the Eighth Circuit, like the Fifth Circuit here, treated a prisoner's claim to a religious exemption to a grooming policy as largely "foreclosed" by a "prior adjudication." *Id.* at 902 (citing *Hamilton* v. *Schriro*, 74 F.3d 1551-55 (8th Cir. 1996)). The Eighth Circuit did so despite the fact that the earlier case was decided twelve years earlier and involved a maximum security prison in another State, that women were not subject to the same grooming policy, and that exceptions were allowed for medical reasons. See *id.* at 911 (Melloy, J., concurring in part and dissenting in part). Cf. U.S. Br. 19.

The fact that courts are reaching different outcomes because they are applying different standards is further demonstrated by RLUIPA cases that do not involve grooming. The Fifth and Ninth Circuits, for example, have also reached different

results in diet cases. In that context, as in grooming cases, the Ninth Circuit has insisted that a prison cannot satisfy RLUIPA's least restrictive means test "unless it demonstrates that it actually considered and rejected" potentially less restrictive measures before refusing a religious accommodation. *Shakur* v. *Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (quoting *Warsoldier*, 418 F.3d at 996). Writing for the court in *Shakur*, Judge O'Scannlain rejected the prison officials' conclusory assertion that providing a kosher meal to a prisoner would be prohibitively costly and remanded for more specific evidence of alternatives. *Id.* at 889-891; see also *Koger* v. *Bryan*, 523 F.3d 789, 801 (7th Cir. 2008) (finding that a prison dietary policy was not the least restrictive means in light of a less burdensome policy employed by federal prisons).

In contrast, the Fifth Circuit denied the right of a Jewish inmate to receive kosher meals. *Baranowski* v. *Hart*, 486 F. 3d 112 (5th Cir.), cert. denied, 552 U.S. 1062 (2007). In doing so, the court emphasized the need to defer to prison officials about the cost of such an accommodation. *Id.* at 125-126. The court also accepted the always-available rationalization that granting an exemption to one group of prisoners "would breed resentment among other inmates; and that there would be an increased demand by other religious groups for similar diets." *Id.* at 125. But see *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (*O Centro*) (rejecting a similar argument because it simply "echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.").

If the Acting Solicitor General were correct, it would be sheer coincidence that the Fifth and Ninth Circuits have reached different results not just in grooming cases, but also in diet cases. But it is not a coincidence. In both sets of cases, the different results are the product of different legal standards, not different facts, and the Acting Solicitor General gives no reason to believe that these differences are likely to disappear absent this Court's intervention.

B. The Decision Below Is Not An Outlier

As the panel explained (see Pet. App. 8a-10a & n.3), the Fifth Circuit's unpublished decision in this case followed directly from its prior published decisions in *Longoria* and *Diaz*. In *Longoria* moreover, the Fifth Circuit concluded that *no* case-specific "evidentiary showing" was necessary because *Diaz* was "dispositive for Longoria's RLUIPA claim." 507 F.3d at 904; accord *Mayfield* v. *Texas Dep't of Criminal Justice*, 529 F.3d 599, 615 n.11 (5th Cir. 2008) (describing *Longoria* as having concluded that the Fifth Circuit's prior holding in *Diaz* made it unnecessary "to reexamine the TDCJ's religious grooming policy to reach a conclusion that Longoria failed to state a claim"). That is precisely the same error that the court of appeals made here.

The Acting Solicitor General nonetheless suggests that the Fifth Circuit's decision in this case is an outlier. In particular, he points to various unpublished decisions that, he asserts, show that "[t]he Fifth Circuit has required that Texas prison

officials justify their refusal to grant a religious exemption to TDCJ's grooming rule for the particular *type* of hair style the inmate seeks to grow." U.S. Br. 12 (emphasis added); see U.S. Br. 12 (discussing *Odneal* v. *Pierce*, 324 Fed. Appx. 297 (5th Cir. 2009) (per curiam) (involving hairstyle known as a "kouplock"); U.S. Br. 20 (citing *Gooden* v. *Crain*, 353 Fed. Appx. 885 (5th Cir. 2009) (per curiam) (beards)). Even if that were true, it would not address the core of the Fifth Circuit's error in *Longoria* and this case—namely, the failure to conduct any analysis that is particular to the specific *inmate* as opposed to the general *hairstyle*. Cf. *O Centro*, 546 U.S. at 430-431 (stating that, under the Religious Freedom Restoration Act, the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] * * * *the particular claimant* whose sincere exercise of religion is being substantially burdened" (emphasis added)).

At any rate, the unpublished decisions cited by the Acting Solicitor General do not purport to, and cannot, limit or alter the Fifth Circuit's published decisions in *Diaz* and *Longoria*. See Fed. R. App. P. 32.1; Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit, Rule 47.5.4.[2] In addition, an examination of the Fifth

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[2] Even if they could do so, moreover, they would merely succeed in bringing the Fifth Circuit closer to the Ninth Circuit at the expense of taking it further from the Sixth Circuit. In a decision discussed previously in this brief, see pp. 4-5, *supra*, the Sixth Circuit squarely *rejected* a district court's conclusion that RLUIPA required a case-by-case assessment of whether inmates with a low security risk

Circuit's other unpublished decisions reveals that the decision below is hardly an outlier, as these other decisions, like the one here, reject RLIUPA-based challenges to prison grooming policies based on nothing more than a citation of *Longoria* and/or *Diaz*. See *Bisby* v. *Crites*, 312 Fed. Appx. 631, 632 ("We have upheld TDCJ's grooming policies against a RLUIPA challenge. *See Longoria v. Dretke*, 507 F.3d 898, 904 (5th Cir. 2007)."), cert. denied, 130 S. Ct. 487 (2009); *Massingill* v. *Livingston*, 277 Fed. Appx. 491, 493 (2008) ("Massingill has failed to establish that any substantial burden placed on the practice of his religion outweighed the substantial interests of prison officials in safety, prisoner identification, and hygiene. *See Longoria v. Dretke*, 507 F.3d 898, 901-02 (5th Cir. 2007); *Diaz*, 114 F.3d at 72-73."). Far from demonstrating the lack of need for guidance from this Court, the Acting Solicitor General's exhaustive efforts to reconcile even the Fifth Circuit's own published and unpublished decisions demonstrate just how intractable the confusion is.

C. The Standard Governing RLUIPA Claims Is Not Clear

The government suggests that summary reversal would be appropriate in this case because the Fifth Circuit failed to apply "the correct legal standard" with respect to the application of RLUIPA's least restrictive means requirement. U.S. Br. 1, 21. Petitioner, of course, agrees with the United States that "the court of appeals * * * erred in affirming

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should permitted to wear precisely the same hairstyle that was at issue in *Odneal*. See *Hoevenaar*, 422 F.3d at 369-371.

the magistrate judge's grant of summary judgment to respondent on petitioner's hair-length claim" and that its errors in doing so were "clear." U.S. Br. 20. Accordingly, petitioner certainly would welcome summary reversal.

This case would seem to be a somewhat atypical candidate for that disposition, however. The reason is simple: contrary to the government's suggestion, "the correct legal standard" for applying the least restrictive means requirement in the prison setting is not settled. Indeed, the lack of clarity is precisely why the courts of appeals are in conflict and reaching different outcomes in factually similar RLUIPA cases. See pp. 4-7, *supra*.

One need only look at the government's brief to see that there are a number of open—and important—questions about the correct legal standard in this context. For example, the government suggests that prison administrators must "offer evidence" explaining the need for the restriction at issue (U.S. Br. 9); demonstrate that they "considered" alternative, less restrictive means (U.S. Br. 13); and "explain" why practices in different prison systems or in different prisons within the same State cannot be followed, provided that there is evidence about these other practices in the record (U.S. Br. 15).

The government remains remarkably vague, however, about the nature and rigor of the court's inquiry. The government never explains whether the standard it is proposing here is as rigorous as the

standard it suggested in *Johnson* v. *California*, 543 U.S. 499 (2005), where it argued that the narrow tailoring requirement in the prison security context requires "serious, good faith consideration of workable * * * alternatives." Brief for the United States as *Amicus Curiae* at 22 (No. 03-636) (internal quotation omitted). Nor does the government explain how, if at all, the standard it proposes squares with this Court's decisions in both *O Centro* and *Sherbert*, which impose a significant burden on defendants to prove that they have adopted the least restrictive means of achieving a governmental interest. See *O Centro*, 546 U.S. at 432-437; *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

The government also consistently sidesteps questions about the defendant's burden of production. The government carefully limits its discussion to "evidence in the record" or "alternatives specifically identified in the course of [an] administrative grievance process." U.S. Br. 14. But the government never discusses how that evidence gets into the record in the first place, whose responsibility it is to put it there, and what happens if they fail to do so. To the contrary, the government is conspicuously silent about what obligation defendants have to produce evidence to satisfy their burdens of production and persuasion, including, for example, evidence about conflicting practices within the same prison system. See 42 U.S.C. § 2000cc-5(2) (providing that the government's burden to demonstrate least restrictive means includes "the burdens of going forward with the evidence and of persuasion").

Summary reversal is most appropriate when the governing legal principles are widely understood and readily applied. See *Gonzales* v. *Thomas*, 547 U.S. 183, 185 (2006) (per curiam) (concluding that summary reversal was appropriate because the court of appeals' error was "obvious" in light of "basic legal principles") (internal quotation marks and citation omitted). In this context, the phrase "least restrictive means" is not self-defining, and this Court has not yet had the opportunity to articulate, clearly and fully, the governing standard for this crucial portion of RLUIPA. Thus, although petitioner would welcome a summary reversal, this Court's consideration of the issues this case raises could benefit from full briefing and argument, including participation by the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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